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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1231

R. DAVID ELY,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF RESPONDENT, UNITED PARCEL SERVICE, INC., OPPOSING PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Petitioner, R. David Ely ("Ely"), was discharged by Respondent, United Parcel Service Inc. ("UPS"), in 1975 following his intentional urination in the cab of his tractor trailer while negotiating a curving exit ramp from an interstate highway with a passenger on board. Ely grieved his discharge pursuant to the collective bargaining agreement under which he was covered. Ely also filed a charge with the National Labor Relations Board ("NLRB") alleging that his discharge violated Sections 8(a)(1) and (3) of the

Labor Management Relations Act, 29 U. S. C. § 158(a)(1) and (3).

The UPS-Teamster Kentucky State Joint Grievance Committee, after a full hearing of Ely's claims, including his claim that he had been discharged because of his grievance activities and assertion of purported rights under the labor agreement, determined that he had been discharged for just cause. Previously, the same Committee had on several occasions modified or rescinded discipline that had been imposed on Ely.

The Administrative Law Judge ("ALJ") before whom the unfair labor practice charge was tried refused to defer to the decision of the Grievance Committee; in addition, he concluded that Ely had been discharged because of protected activities and recommended that Ely be reinstated with back pay. Ruling upon exceptions to the ALJ's Decision and Recommended Order, a two-member majority (consisting of Chairman Fanning and Member Jenkins) of the NLRB panel adopted the ALJ's determination. The third member of the panel, Member Murphy, dissented strenuously from the majority's finding that Ely had been discharged in violation of the Labor Management Relations Act.[1]

1. In his Petition, Ely states that Member Murphy, despite opposing the majority's ultimate ruling, agreed that UPS had harassed him (Petition at 5), and agreed that UPS had been unlawfully motivated in terminating him (Petition at 8 n. 5). However, we believe that Member Murphy's opinion reveals no such concurrence by her. Rather, she succinctly stated her conclusion that "in the face of what can only be described as Ely's unsafe conduct which placed his and Hatcher's [a passenger in the truck] lives in jeopardy, it does not follow—nor is there any basis for finding—that his discharge was caused in part or whole by his protected concerted and/or union activities, as found by the Administrative Law Judge." (App. 37a).

The only apparent area of concurrence between Member Murphy and the panel majority was on the issue of NLRB deferral to the decision rendered by the grievance panel under the collective bargaining agreement which had sustained Ely's discharge. (*See* App. 36a n. 4).

Upon petition of the NLRB for enforcement, the United States Court of Appeals for the Sixth Circuit, after full briefing and oral argument, issued an Order (App. 1a) finding "that the record when considered as a whole does not contain substantial evidence to support the Board's conclusion that respondent discharged Ely for his involvement in protected concerted activities. . . ." (App. 2a).

At the time of his discharge Ely was a feeder driver for UPS. As such, his principal responsibility was to deliver trailer loads of packages to a meeting point where he would exchange trailers with a feeder driver from another UPS district and return to his terminal with packages to be processed there. Timely deliveries by all feeder drivers is essential to the operation of the entire UPS system; one late delivery will have a domino effect on others with resulting delays being caused at many terminals and meeting points.

Ely's discharge followed several years of conflict between Ely and UPS concerning his insistence on regularly taking unscheduled "bathroom" breaks which contributed to his ongoing problems in keeping to his schedule.

In 1974, Ely filed grievances concerning two instances in which he was disciplined for taking unscheduled "bathroom" stops in addition to the two 15-minute breaks and one-half hour lunch period to which he was entitled. In both cases, the joint union-company grievance panel recognized a driver's right to make a stop as needed to heed nature's call and rescinded the discipline. However, the panel also served notice on Ely and other UPS drivers that "under normal conditions one stop [the scheduled break] on each leg of the interstate highway should be sufficient." (App. 8a). The panel also admonished Ely and other drivers "to use rest room facilities which will result in the least amount of lost time." (App. 8a-9a). Ely received

other warnings in early 1975 which were rescinded by the grievance panel.

In September, 1975, Ely was again discovered to be making at least two and often three unscheduled stops in a single round trip. He and four other drivers who were also found to be making unscheduled stops received warning letters. Ely persisted in his activity and was discharged. Upon review, the State Grievance Committee sustained the issuance of the warning letter but reduced the discharge to a 30-day suspension. Upon his return from the suspension, Ely resumed his pattern of unscheduled breaks without deviation.

On his last day of work for UPS, November 5, 1975, Ely was accompanied by a supervisor on his run from Lexington, Kentucky to Knoxville, Tennessee. According to Ely, when he approached the area on I-75 where he always took his unscheduled "bathroom" stop on the return trip from Knoxville, the supervisor told him that if he stopped he would be discharged. The ALJ credited Ely's testimony in this regard over the supervisor's flat denial of any such threat. (App. 15a n. 17, 17a). In any event, Ely proceeded on I-75 until reaching his exit, approximately three miles, or five minutes, from the UPS terminal. Ely had been driving 1½ hours since his last stop. Approaching the exit Ely unzippered his pants and began to urinate in the cab. He continued to do so while driving on the curving exit ramp; operating the tractor trailer with one hand and urinating with the other, Ely ran off the pavement of the ramp and onto the shoulder.

Immediately following this incident Ely was suspended pending a medical examination to determine whether he had some physical ailment which would require him to urinate as frequently as he claimed was necessary. After he refused to undergo an examination by a urologist, Ely was discharged.

REASONS FOR DENYING THE WRIT

The instant petition seeks this Court's review of a run of the mill **Universal Camera**[2] case in which the United States Court of Appeals for the Sixth Circuit determined that the NLRB's decision—that Ely was discharged because of his protected activity rather than for urinating in the cab of his moving tractor-trailer—was not factually supported by substantial evidence on the record as a while.

Such determinations have been left by Congress to the courts of appeals subject to review by this Court only in very rare instances. **Universal Camera,** *supra* at 491. *See* Section 10(e) of the Labor Management Relations Act, 29 U. S. C. § 160(e). Such review "is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.'" **NLRB v. Pittsburgh Steamship Co.,** 340 U. S. 498, 502 (1951) (citation omitted).

Contrary to the suggestions of Petitioner, no such public interest is present here. Nor is there any conflict between courts of appeals. Indeed, no significant legal question is at issue. We are concerned only with the factual basis for an NLRB finding that a discriminatory discharge took place. The only question presented by Petitioner is whether, when a court of appeals reverses an NLRB decision in such a case solely because substantial supporting evidence is lacking, the court of appeals is required to issue a full opinion detailing the lack of substantial evidence.

Petitioner asserts that, in failing to render such an opinion and by merely stating in an order that it found the record to be lacking substantial evidence, the court of

2. **Universal Camera Corp. v. NLRB,** 340 U. S. 474 (1951).

appeals "so far departed from the usual, accepted, and indeed necessary, course of proceeding as to call for an exercise of this Court's power of supervision." (Petition at 7).

Despite Petitioner's conjecture as to possible bases for decision which, if they had actually been adopted by the court of appeals, might have been error (Petition at 11), the order below is unmistakable as to the basis for the court's action. The court stated its conclusion as follows:

> "Upon our review of the record before the court, the briefs and oral argument of counsel for the parties, and the court being fully advised in the premises finding that the record when considered as a whole does not contain substantial evidence to support the Board's conclusion that respondent discharged Ely for his involvement in protected concerted activities, Therefore,
>
> "It is ORDERED that enforcement of the order of the National Labor Relations Board be and hereby is denied." (App. 2a).

Contrary to petitioner's hypothesis,[3] the conclusion stated by the court is precisely the conclusion required by Section 10(e) of the Labor Management Relations Act and by this Court's decision in **Universal Camera,** *supra,* 340 U. S. at 491, in order to deny enforcement of an NLRB decision in a case such as this—that there is lacking substantial evidence in the record as a whole to support the agency finding. Thus, the order below demonstrates that the court of appeals applied the proper standard.

Petitioner also argues that this Court should require a detailed written opinion whenever the NLRB is reversed on factual grounds so that (1) the grounds for possible review by this Court are explicit, (2) the NLRB is advised of its error and can avoid its repetition in the future, and

3. Petition at 11.

(3) the parties have an explanation of the reasons why one prevailed over the other. (Petition at 9).

Not one of these purposes justifies review by this Court. First, the suggestion that full opinions should be written by any court of appeals which reverses the NLRB on factual grounds so that this Court can determine whether the case merits review presupposes that Supreme Court review of fact questions is common. Under Rule 19 of the Rules of this Court, decisions of courts of appeals resolving factual issues and involving no precedential rulings of law are plainly not certworthy. Second, it seems equally obvious that the NLRB itself does not need a full opinion to inform it that a court of appeals has found that a factual record does not support the NLRB's conclusions. Nor, obviously, does it feel the need for guidance in future factual situations. These facts are illustrated by the NLRB's failure to seek certiorari in this very case or in any of the other cases cited by Petitioner (Petition at 8 n. 7) as instances of summary reversal of NLRB decisions on factual grounds. Finally, while it may be true that parties who find themselves aggrieved would like the benefit of an opinion explaining why they are not entitled to the relief they had won before the NLRB, they, or at least their counsel, are probably well aware of the crucial issues and the strengths and weaknesses of their case by the time it has been presented to an administrative law judge, the NLRB, and a court of appeals.

The nub of this case is whether a court of appeals shall be required to write a full opinion whenever it does not sustain a lower court or agency decision on factual grounds. Undoubtedly due in large part to their overwhelming case loads, a majority of the courts of appeals have rules which envision summary treatment, including reversal, of cases before them. Such rules typically permit such action in cases where the issues occasion no need for

a full exposition, or the error below is obvious, or no new points of law are involved that would make any decision of general precedential value.[4] For example, the rule adopted by the Court of Appeals for the Sixth Circuit authorizes summary treatment, *inter alia,* where the questions for decision are manifestly so insubstantial as not to need further argument or where clear error is present. Rule 9(d) of the Rules of the United States Court of Appeals for the Sixth Circuit.

The instant case, and those of its ilk, very often fall squarely within such guidelines and little benefit would be derived from full-blown opinions, even when the NLRB is reversed. The desirability of full opinions is especially small when such minimal benefit is balanced against the additional burden that would be imposed on already overstrained courts.[5]

4. *See* Rules 6(g) and 13(c) of the District of Columbia Circuit; Rules 12 and 14 of the First Circuit; Section 0.23 of the Rules of the Second Circuit; Rule 9(d) of the Sixth Circuit; Rule 21 of the Ninth Circuit. *Cf.* Rule 18(c) of the Fourth Circuit.

Other circuits have rules permitting disposition without opinion, but such rules appear to be limited to affirmances. *See* Rule 21 of the Fifth Circuit; Rule 35 of the Seventh Circuit; Rule 14 of the Eighth Circuit; Rule 17 of the Tenth Circuit.

5. According to the 1979 Management Statistics for the United States Courts issued by the Director of the Administrative Office of the United States Courts, the courts of appeals in the aggregate disposed of approximately 9,270 cases after hearing or submission in 1979. Approximately 3,589 cases were determined by a signed opinion, approximately 3,686 cases were determined by unsigned opinions, and approximately 1,995 were resolved without any opinion.

CONCLUSION

For the foregoing reasons, this Court should not grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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